

Unfair Contract Term Reforms Commence 10 November 2023 - Don't Let Your Business Get Caught!

10 November 2023 marks “d-day” for the commencement of further reforms to the Unfair Contract Term (UCT) regime. These reforms mark the largest change to the UCT regime since the 2016 amendments.

Current UCT Regime

A term of a contract is void if:

- The contract is a consumer contract or a small business contract;
- The contract is a standard form contract;
- The term of the contract is “unfair”.

Unless contracted directly by the owner for a residential build, generally, within the construction industry, the UCT Regime applies if the relevant contract is a “small business contract”.

Under current UCT Regime, a “small business contract” is one where:

- at the time the contract was entered into, at least one party employed fewer than 20 employees;
- either of the following applies:
 - (a) The upfront price payable under the contract does not exceed \$300,000;
 - (b) The contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000

New UCT Regime

The new UCT Regime include a varied definition of a “small business contract” – one party must:

- employs fewer than 100 persons; OR
- have a turnover of less than \$10,000,000.

“Upfront price” concept removed.

Also, changes affect the following (discussed further below):

- provisions relating to what is a standard form contract;
- what power the Court has when faced with unfair terms;
- what the penalties are.

Standard Form Contracts

The UCT regime applies to standard form contracts.

Contracts presumed to be standard form unless proven otherwise.

Relevant factors:

- whether one of the parties has all or most of the bargaining power relating to the transaction
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- whether one of the parties has made another contract, in the same or substantially similar terms, prepared by that party, and, if so, how many such contracts that party has made [New];
- whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented;
- whether another party was given an effective opportunity to negotiate the terms of the contract;
- whether the terms of the contract take into account the specific characteristics of another party or the particular transaction.

A contract may be determined to be a standard form contract despite the existence of one or more of the following:

- a) an opportunity for a party to negotiate changes, to terms of the contract, that are minor or insubstantial in effect;
- b) an opportunity for a party to select a term from a range of options determined by another party;
- c) an opportunity for a party to another contract or proposed contract to negotiate terms of the other contract or proposed contract.

What is Unfair?

A term is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In determining whether a term of a contract is unfair, a court may take into account such matters as it thinks relevant, but must take into account the following:

- the extent to which the term is transparent;
- the contract as a whole.

A term is transparent if the term is:

- expressed in reasonably plain language; and
- legible; and
- presented clearly; and
- readily available to any party affected by the term.

The legislation provides the following, non-exhaustive, list of examples of unfair terms:

- a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
- a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
- a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
- a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
- a term that limits, or has the effect of limiting, one party's right to sue another party;
- a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
- a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract.

From a construction perspective, possible unfair terms include:

- Indemnities that are too broad and one-sided;

- Limitation on liability that go beyond what is reasonable;
- Termination provisions that are too one-sided;
- Non-disparagement clauses in building contracts;
- Overly harsh liquidated damages terms;
- Unreasonably short periods to lodge notices;
- Warranty provisions that are too broad.

Very limited caselaw on what terms will be deemed unfair in a construction context.

Power of the Court

In addition to declaring a term void (and potentially an entire contract if it cannot survive the severing of the term) and imposing monetary penalties, Courts can now also:

- vary a contract;
- Make orders relating to other existing contracts (whether or not before the Court) that contain the same unfair term as a contract before the Court;
- prevent terms being included in future contracts;
- make orders to prevent or reduce loss or damage that may be caused by the term.

Penalties

Maximum penalty per contravention for companies is now the greater of:

- \$50million;
- Three times the value of the benefit;
- 30% of adjusted turnover for breach period.

For individuals, maximum penalty is \$2.5million.

Tips

- Terms need to be balanced. Consider both points of view.
- Include counter-balancing terms.
- Avoid overly broad terms.
- Make transparent.

Also be conscious of where you are seeking to “back to back” contractual terms, where the UTC regime may not apply to your contract with the head contractor but may apply to your contract with a sub-subcontractor.



Charles Moran, Partner
Lynch Meyer Lawyers
08 8236 7654
cmoran@lynchmeyer.com.au